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Supreme Court of the United States

OCTOBER TERM, 1962

No. 516

MALCOLM LEBERT PARKER, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 15, 1962
CERTIORARI GRANTED DECEMBER 17, 1962

SUPREME COURT OF THE UNITED STATES

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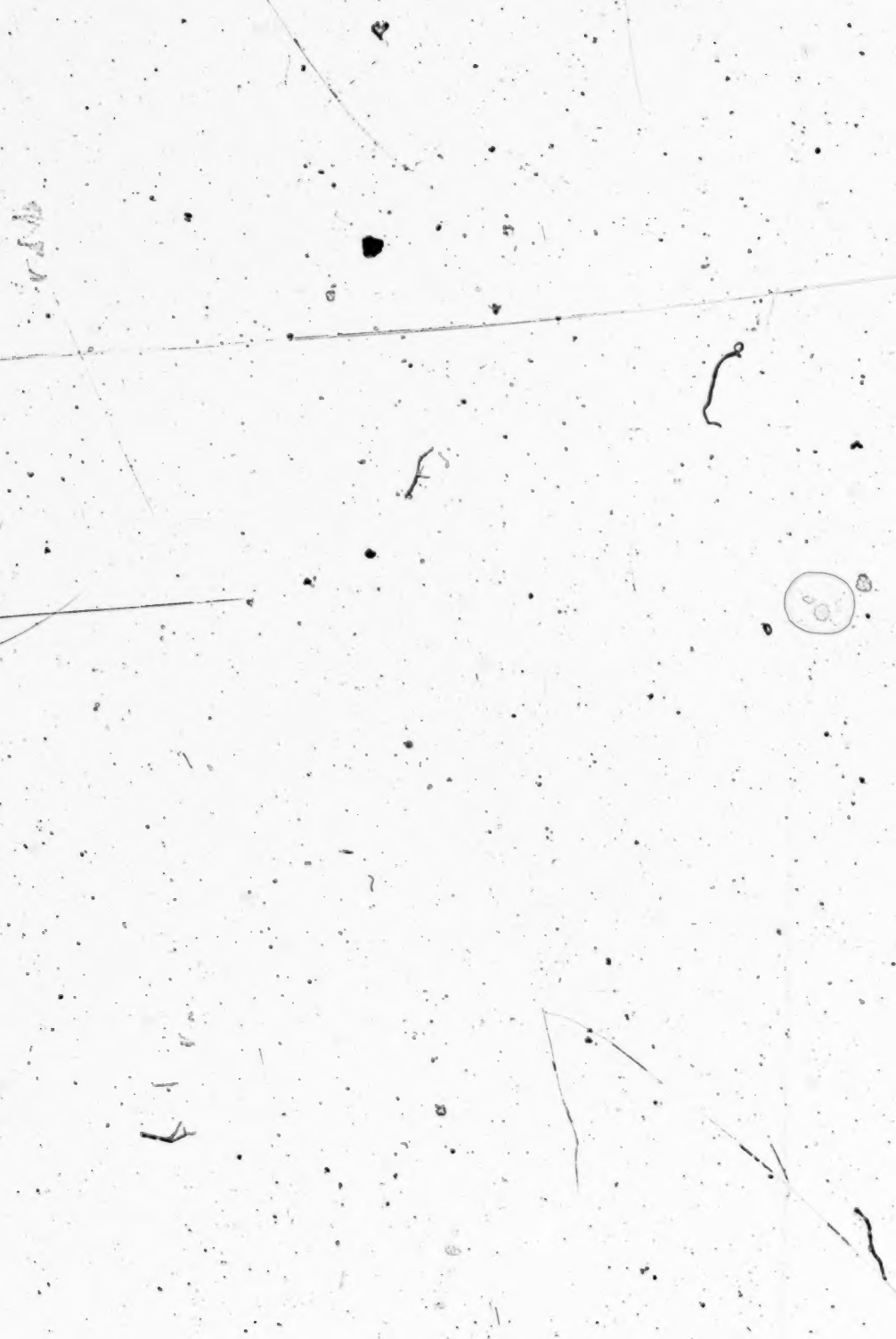

fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 13583

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

MALCOLM LEBERT PARKER, Defendant-Appellant.

Appeal from the United States District Court, for the Northern District of Illinois, Eastern Division.

Honorable Julius J. Hoffman, District Judge.

Appendix for Defendant-Appellant

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 61 CR 49

UNITED STATES OF AMERICA,

vs.

MALCOLM LEBERT PARKER.

STATEMENT REQUIRED UNDER RULE 12 (c) OF THE RULES OF THE UNITED STATES COURT OF APPEALS

1. Indictment was filed in this matter on January 17, 1961.

2. On January 17, 1961, a bench warrant was caused to be issued and bond was fixed at $1,000.00 by Judge Joseph Perry.

3. On January 20, 1961, the defendant's attorneys filed their appearance and entered a plea of not guilty and on said date the defendant filed his appearance bond in the sum of $1,000.00.

4. On September 18, 1961, the defendant's cause was called for trial, a jury was selected and sworn. Evidence was heard for the government and at the close of the government's case, the defendant moved for a judgment of acquittal. Said motion was argued and denied by the court. Evidence was then heard for the defendant and after the defendant rested, rebuttal evidence was heard for the government. At the close of all the evidence, the defendant moved for a judgment of acquittal. Said motion was argued and denied. Final arguments were heard and the court instructed the jury. The jury retired to consider [fol. 2] its verdict and by agreement between the government and defendant, the polling of the jury was waived.

5. On September 26, 1961, the following verdict of the jury was filed, "We, the jury, find the defendant Malcolm Lebert Parker guilty as charged in the indictment." The court then entered judgment on the verdict and the oral motion of the defendant for a new trial was denied.

6. The court committed the defendant to the custody of the Attorney General for a period of two years and fined $1,000.00 and costs. The defendant to stand committed until the fine and costs are paid and bail was fixed in the sum of $5,000.00.

7. On September 26, 1961, the defendant filed his appeal bond of $5,000.00.

8. On October 3, 1961, the defendant filed his Notice of Appeal and a copy of said Notice of Appeal was mailed to the U. S. Attorney, U. S. Marshal and the U. S. Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Francis Heisler and Rotenberg, Schwartzman & Richards, By: Mark L. Schwartzman, Attorneys for Appellant.

7 South Dearborn Street, Chicago 3, Illinois, RAndolph 6-1678.

UNITED STATES DISTRICT COURT

* * (Caption—No. 61 CR 49) * *

INDICTMENT—January 17, 1961

The January 1961 Grand Jury charges:

That on or about September 14, 1960, at Chicago, Illinois, [fol. 3] in the Northern District of Illinois, Eastern Division,

MALCOLM LEBERT PARKER,

defendant, being a male person who was required to and did register under the provisions of the Universal Military Training and Service Act, and who duly became a registrant at Local Board 177, Sullivan, Illinois, and was duly classi-

fied in Class 1-A-O, and was ordered to report for induction at Chicago, Illinois by said Local Board, then and there unlawfully, wilfully, knowingly and feloniously did neglect, fail and refuse to perform the duty of submitting to induction; in violation of Section 12, Universal Military Training and Service Act, Section 462, Title 50 Appendix, United States Code.

A True Bill:

Foreman Leo G. Unger

R. Tieken, United States Attorney.

WOB/sjl

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 61 CR 49) * *

ARRAIGNMENT AND PLEA

This day comes the United States by the United States Attorney comes also the defendant Malcolm Lebert Parker in his own proper person and by his counsel and being arraigned upon the Indictment filed herein against him pleads not guilty thereto and it is

Ordered that this cause be and the same is hereby set for trial on September 18, 1961 and on the defendant's own motion it is

Further Ordered that the defendant's bond be and it is hereby reduced to the sum of Five Hundred Dollars.

[fol. 4]

IN THE UNITED STATES DISTRICT COURT

ORDER AS TO JURY VERDICT—September 18, 1961

Monday: September 18, 1961

Present: Honorable Julius J. Hoffman, District Judge.

* * (Caption—No. 61 CR 49) * *

This cause this day being called for trial comes the United States by the United States Attorney comes also the defen-

dant Malcolm Lebert Parker in his own proper person and by his counsel and the jury having been selected and sworn and the trial proceeds and at the close of the government's case the defendant by his counsel moves for judgment of acquittal and the Court having heard arguments of counsel said motion is overruled and the trial proceeds and the Court now having heard all the evidence adduced by the parties and arguments of counsel finds the defendant guilty as charged in the Indictment filed herein against him.

Abstract of Proceedings

Before the Hon. Julius J. Hoffman, one of the judges of the Court in Chicago, Illinois, on Monday, September 18, 1961.

Appearances:

Hon. James P. O'Brien, United States Attorney, by Mr. William O. Bittman, Assistant United States District Attorney, representing the plaintiff;

Mr. Francis Heisler, and Mr. Mark L. Schwartzman, representing the defendant.

Opening statement on behalf of the Government by Mr. Bittman.

Opening statement on behalf of the defendant by Mr. Heisler.

[fol. 5] The Government, to maintain the issues in its behalf, introduced the following evidence, to-wit:

HELEN KENNEY, called as a witness on behalf of the Government having been first duly sworn was examined and testified as follows:

Direct examination.

By Mr. Bittman:

My name is Helen Kenney. I live in Sullivan, Illinois, and I am clerk of Local Board 177, Sullivan, Illinois, Moultrie County. I have been clerk since August 11, 1958.

My duties as clerk are to process the registrants under Selective Service from the time of their registration until induction. The records of Local Board 177 pertaining to the registrants are kept under my supervision and control and contain all documents, except the registration card. The registrations cards are kept separate and are permament records. I am responsible for their safety. It is possible from Selective Service records to determine whether an individual is registered and whether he was subsequently classified because an entry is made on the back of the questionnaire and also in the local board minutes. If a registrant requests a certain classification there will be a record in his file. Any documents that he submitted were to be considered in making the classification.

The date of the local board action is indicated in the file on the back of the questionnaire on Form 100. The file would disclose whether the registrant was ordered to take a physical examination and the result thereof would also appear. The classification action of the local board is subject to appeal and if one appeals a classification that would appear in his file.

The action of the appeal board appears in the file on the appeal board record and it would be noted on the back of [fol. 6] the questionnaire as every other action is. If a registrant desires to submit a letter or other documents in writing to his local board that would appear in his file. If he were ordered to report for induction the original goes to the registrant and a copy appears in his files. If he failed to obey the order we would receive a letter from the induction station and that letter would be part of the Selective Service file. There is no transaction concerning the registrant which would not be reflected in his Selective Service file.

I am acquainted with the defendant Malcolm Lebert Parker and I see him in the Court.

(The record shows that the witness has identified the defendant Parker)

Witness continuing: Government Exhibit A for identification is the registration card of Malcolm Lebert Parker. It is kept under my supervision and control and was made

in the ordinary course of business, at the time the registrant came in at eighteen years of age to register on 9 May 1955.

(Government Exhibit A was admitted into evidence without objection)

Witness continuing: Government Exhibit B and B-1 through B-35 represents the complete Selective Service file of Malcolm Lebert Parker. This was kept under my supervision and control in the regular course of business in Local Board 177.

(The Government offers into evidence Exhibit B and B-1 through B-35 to which the defendant objects and requests voir dire examination of the witness)

Voir dire examination of Helen Kenney.

By Mr. Heisler:

I am familiar with the Selective Service regulations. [fol. 7] I followed these regulations when I prepared Mr. Parker's file.

(To defendant's question how the witness maintained the record of Defendant Parker the Government objects.)

"The Court: Mr. Heisler, I suggested to you that I will permit cross examination at this time only in respect to the admissibility of the documents. You will have a full opportunity for cross examination after the direct has been completed.

Mr. Heisler: That is exactly it, your Honor, before I make my objection.

The Court: No, no. That question does not relate to this particular document or these particular documents.

Now you may talk about only these documents; anything else, later.

Mr. Heisler: All right."

(To defendant's question how Government Exhibit B-7 got into the file of defendant Parker, the Government objects and objection is sustained.)

(To defendant's question as to who prepared Exhibit B-9, the Government objects. And the objection is sustained.)

By Mr. Heisler:

Q. In Government's Exhibit B-16 there is reference made to a hearing officer's letter. Would you please tell us whether the hearing officer's letter is included in the file of this defendant?

Mr. Bittman: Your Honor, I object to that.

The Court: Sustain the objection.

I suggest to you again, Mr. Heisler, if you persist in this kind of cross examination at this time, I will not permit you to cross examine.

Please continue.

[fol. 8] Mr. Heisler: I want to make my objections.

The Court: Go ahead. I know what you want to do, but this kind of cross examination is only at sufferance. The Court isn't obligated to permit you to cross examine at this time at all.

Mr. Heisler: I understand that, yes, but it understood yesterday, your Honor, that this witness testified that she prepared the files in accordance with the regulations.

The Court: However you understood it yesterday, I think I have made myself clear today.

Mr. Heisler: All right, your Honor.

At this time the defendant objects to the introduction into evidence of Government's Exhibits B-7, B-9, B-16 and B-28 on the ground that they were not prepared and not put into the file in accordance with the regulations of Selective Service.

(Over the objection of the defendant Government's Exhibits B-7, B-9, B-16 and B-28 are admitted into evidence. With no objection by the defendant Government's Exhibits B, B-1 through and including B-6, B-8, B-10 through and including B-15, B-17 through and including B-27, B-29 through and including B-35 admitted into evidence.)

Mr. Heisler, on behalf of the defendant asks that the record show that while defendant objects specifically to B-9, B-16 and B-28 he is objecting to the introduction of

all the documents submitted by the Government and further the defendant moves that the file be excluded because it is not complete in that the hearing officer's report to which reference is made in Exhibit B-16 is not in the file.

The Court: I will let my ruling stand in respect to the admissibility of these documents. Have you finished your cross examination of this witness?

Mr. Heisler: On that score, yes, your Honor.

[fol. 9] The Court: You may continue with your direct examination.

Mr. Heisler: May I point out that that was my voir dire in connection with my proposed objection; it is not my cross examination.

The Court: You don't have to point that out to me. I am the one who gave you the privilege to engage in it.

Mr. Heisler: That is right, because the Court asked if I had finished my cross examination."

Witness Kenney resumes direct examination: Pursuant to rules and regulations we send the original and three copies of DD Form 47 to the induction center with the order to report for induction. We also send a delivery list listing the registrant's name and his number. Government's Exhibit C is the original delivery list pertaining to Malcolm Parker and it reflects whether he submitted to induction. It is kept in a separate file. It is part of the official records of Local Board 177.

(Government offers into evidence Exhibit C to which the defendant objects. Over the objection to Exhibit C on the grounds it is hearsay and the maker available to testify, it is received in evidence.)

Cross examination of witness.

By Mr. Heisler:

Looking at Government's Exhibit No. 7 I notice that it is addressed to the appeal board. It was evidently sent to the appeal board and was placed in the registrant's file when the appeal board had that file. I assume it was sent by the signer. Under the regulations every document that is placed into the file of the registrant is listed in the cover

sheet. Looking at the cover sheet it does not seem that Exhibit B-7 is listed.

(To the defendant's question the witness who prepared the memorandum known as Exhibit B-9, the Government objects and the objection is sustained.)

[fol. 10] Government's Exhibit B-16 is the letter of the Assistant Attorney General and in the first paragraph it says "The information given by the registrant to Mr. F. M. Brittingham, a hearing officer of the Department of Justice."

(To defendant's question whether the Brittingham report so referred to in Government's Exhibit B-16 is in the file the Government objects. Objection sustained on p. 61.)

Defendant moves that the Government be ordered to produce the Brittingham file. The Court refuses to hear the motion to produce.

Motion to produce is renewed on the ground that B-16 is not a fair résumé of the Hearing Officer's report.

Defendant again moves for the production by the Government of the Brittingham report to clarify the contradictions between B-16 and B-17.

The motion to produce is denied.

Witness continuing: I am familiar with Regulation No. 1621.8 which is entitled "Preparation of cover sheet, SS Form 101". That regulation provides for the mailing of the classification to registrant and for the maintaining of the cover sheets. It provides that every paper pertaining to the registrant, except his registration card shall be filed in the cover sheet.

(To the defendant's question whether the hearing officer's report pertaining to the defendant should have been in his file in accordance with the Regulation No. 1621.8, the Government objects and the objection is sustained)

Government's Exhibit B-7 is not listed on the cover sheet.

(To defendant's question whether witness knows how document B-7 got into the defendant's file, the Government objects and the objection is sustained.)

[fol. 11] WALTER HARRY SCHUTTLER, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Bittman:

My name is Walter Harry Schuttler and I am a civilian employee of the United States Government since the 1st of November, 1960. Prior to that date I was a member of the armed forces of the United States, in the Army, and I retired as a captain. Prior to my retirement I was the Deputy Commanding Officer of the Armed Forces Induction Station, Chicago, Illinois, from October 10, 1955 to February 9, 1959 and again from March of 1960 until the 1st of November 1960. I served in that capacity on September 14, 1960. As Deputy Commanding Officer I was responsible for the receipt, orientation, processing, forms and allied papers for all personnel forwarded by the draft boards for physical examination or for induction into the armed forces. My duties include the supervision of the making and keeping of induction records including the processing of the inductees.

The procedure followed at the Armed Forces Induction Station is that the inductee is sent by the draft board on a certain date. He comes to headquarters, the induction station and he is told what he is going to do that day. He has to make out forms. He is given a brief physical examination, fingerprinted, taken to the ceremony room, sworn in by me and he is a member of the armed forces then. The induction ceremony requires him to take a step forward and that step forward signifies his induction into the armed forces of the United States. If a registrant refuses to be inducted he would be removed from the group and processed separately in my office. The separate cere- [fol. 12] mony of the refuser is made part of his induction record. The sergeant will notify me of the refusal and I set a time when the individual is to be brought in my presence. He comes in and I have him sit down and I explain the requirements under the law and give him an oppor-

tunity to accept induction, and go through a brief ceremony in accordance with the Army regulations at which time he makes an official refusal. After he has refused we write a letter to the U.S. District Attorney with a copy to the local board concerned, a copy to the State Director of Selective Service and a copy is kept in my files and that file is under my care and custody at the Induction Station. I brought with me certain records of the Induction Station. Exhibit C-1 is my official notification to the U.S. District Attorney that a Malcolm Lebert Parker did report for induction on September 14, 1960 and that in my presence he refused to be inducted into the armed forces. This document was prepared at my direction and was forwarded to the U.S. District Attorney.

(Government Exhibit C-1 was offered into evidence to which the defendant objects at which time the Government withdraws the offer)

Witness continuing: Exhibit C-1 is an official induction station record required to be made—by Army regulations and it is made in the regular course of business normally within a few hours after the individual has refused. They are kept under my supervision and control.

(Government offers into evidence Exhibit C-1 to which defendant objects, and thereupon the Government Attorney holds the offering of the document in abeyance.)

Witness continuing: I know the defendant Malcolm Lebert Parker. I see him in the Court room. He is the [fol. 13] young man with the light shirt, the third one in the row—the last individual in that row of three gentlemen at the second table. (The record indicates that the witness has identified the defendant in open court) Witness continues: I saw Malcolm Lebert Parker on September 14, 1960. I had a conversation with him in the presence of another registrant. That was at the Armed Forces Induction Station in my office. That took place in mid-afternoon. I asked him why he was refusing induction and he told me that he had conscientious objections to serving and I explained to him that under the Universal Military Training and Service Act he was obliged to serve or refuse induction

and I gave him an opportunity to be inducted and if he intended to refuse we would permit him to make an official refusal. I did make an official ceremony. I had him stand in front of me and I informed him very emphatically that when I read the induction ceremony if he intended to refuse induction he was not to move from the spot that he was standing on, that if he took one step forward that step constituted his induction. I asked him if he understood and he said yes. I started the ceremony by saying his name and that he was found physically and mentally—and I said "You are about to be inducted into the Armed Forces of the United States. When I call your name you will answer 'Here, Sir' and take one step forward. If you intend to refuse induction you are to remain standing exactly as you are." He did not step forward. I told him then that I am going to give him a second opportunity to take the step forward and I repeated the ceremony and he did not take the second step forward. That ended the ceremony and I asked him if he would like to make a statement in his own handwriting that he refuses to accept induction and he declined to make the statement.

[fol. 14] Subsequent to the ceremony I prepared a letter to the U.S. District Attorney—Government Exhibit C-1 is part of the official induction station records required by Army regulations to be made in the regular course of my business and it is kept under my supervision and control at the Armed Forces Induction Station.

(Government Exhibit C-1 is offered into evidence to which the defendant objects and the witness is examined.)

Voir dire examination of witness.

By Mr. Heisler:

Q. Captain Schuttler you quit the armed forces on November 1st, 1960?

Mr. Bittman: I object to the prejudicial nature of that question.

The Court: Sustain the objection.

I say to you again, Mr. Heisler, you may cross-examine at this time in respect to the admissibility of the document. Now, if you ask another question that doesn't relate to it, I will forbid any further cross-examination.

Mr. Heisler: If your Honor please, I cannot put all the questions at the same time. He testified that he had under his control—

The Court: You will have full opportunity for full cross examination later.

By Mr. Heisler:

Q. Mr. Schuttler, you had these documents you testified to under your control?

A. Yes.

Q. When you left the armed forces, you took it home and kept it in your control?

Mr. Bittman: I object to that. He has testified to that.

[fol. 15] The Court: I sustain the objection.

There will be no further cross examination at this time. You may have full opportunity to cross examine this witness after the direct examination has been completed.

Do you object to the exhibit?

Mr. Heisler: I object to it on the ground, your Honor, that it was not shown that this was in the control of this witness who testified that he quit the armed forces on November 1st. There is—that was 1960. Today is September, 1961, and nobody knows how this document came about, whether it was in the Government file or if it was put there yesterday.

The Court: The objection of the defendant to Government's Exhibit C-1 for identification will be overruled. The Court will admit into evidence Government's Exhibit C-1 for identification as Government's Exhibit C-1.

(Whereupon Government's Exhibit C-1 for identification was admitted into evidence as Government's Exhibit C-1.)

Redirect examination.

By Mr. Bittman:

I took the documents that I brought with me from the official files of the Armed Forces Induction Station. Exhibit C-2 is a special order issued by the recruiting station which lists a group of men who are en route to Fort Leonard Wood, Missouri. These men have been sworn in and are soldiers in the United States Army. The date is the 14th of September, 1960. The name of Malcolm Lebert Parker is not on the list. Exhibit C-3 is called the delivery list received in my office and it has on it the names of all the individuals being forwarded by the Local Board 177, Sullivan, Illinois. On that list the name of Malcolm Lebert Parker appears. Subsequent to the ceremony I had my staff annotate this document indicating that Parker was a [fol. 16] conscientious objector and refused induction on the 14th of September, 1960. I am required to make these documents and they are kept under my supervision and control.

(Whereupon the Government offers into evidence Exhibits C-2 and C-3 to which the defendant objects and the witness is examined.)

Voir dire examination.

By Mr. Heisler:

At the present time I am the official custodian of all documents in the Chicago recruiting main station.

(Over the objection of defendant, Government's Exhibits C-2 and C-3 are admitted into evidence.)

Direct examination.

By Mr. Bittman:

When the inductees report for induction at the induction station in Chicago they are given a physical examination. Government Exhibit B-27 is a copy of the induction record and it discloses whether or not Parker

was found fully acceptable for induction on September 14, 1960.

Cross examination.

By Mr. Heisler:

I was at the induction center from the 10th of October, 1955 until November 1st, 1960. That is about five years. During that time about forty to fifty people refused induction as conscientious objectors.

(To the question of the defendant whether there is anything in particular with reference to Parker that the witness remembers him the Government objects and objection is sustained.)

(The following proceedings were had in open court out of the presence and hearing of the jury:)

Mr. Bittman: I am prepared to rest the Government's case.

[fol. 17] Taking into consideration the full Selective Service file before your Honor, I maintain that there is a basis in fact contained in the file for defendant's 1-A-O classification.

The Court: Well, I have looked at the Government's Exhibits and I am ready to determine for the record that there is a basis in fact to support the classification. I say that on the record, Mr. Heisler.

Mr. Heisler: It is quite discouraging to me to make a motion for my directed verdict because I was ready to argue it.

The Court: I think that the Supreme Court has said that I must do that. Now if you want to try to persuade me that I am mistaken about it, I most certainly will hear you.

Mr. Heisler: All right, your Honor. I would like to do just that.

(In the presence and hearing of the jury the following proceedings were had.)

Mr. Bittman: At this point, your Honor, the Government will rest.

(Out of the presence and hearing of the jury the following proceedings were had.)

MOTION FOR JUDGMENT OF ACQUITTAL AND DENIAL THEREOF

Mr. Heisler: May I, at this time, your Honor, present on behalf of the defendant a motion for a judgment of acquittal?

(Mr. Heisler argues in support of his motion for a judgment of acquittal.)

(Thereupon Mr. Bittman argues against the judgment of acquittal. Mr. Schwartzman presents rebuttal argument on behalf of the defendant. Mr. Bittman, on behalf of the Government replies.)

[fol. 18] The Court: The Court finds that there is a basis in fact.

The motion of the defendant made at the close of the Government's evidence for a judgment of acquittal will be denied.

Thereupon the defendant, to maintain the issues in his behalf, presented the following evidence, to-wit:

HELEN KENNEY, a witness called by and on behalf of the defendant herein, having been previously duly sworn, resumed the stand and testified further as follows:

Direct examination.

By Mr. Schwartzman:

I am the same Mrs. Helen Kenney who testified in this case. I have been Secretary of Local Board 177 since August 11, 1958. Government's Exhibit A and B-1 through B-35 represents the Selective Service file of defendant Parker.

I testified that whenever a document is received by the board it is stamped and then it is inserted in the person's file. Looking at Government's Exhibit B-7 which purports to be a letter of Leah A. Harshman, I really don't know how it got into the file. It was in the file when it was returned to the local board from the appeal board.

The file was returned from the appeal board in December, '57, and at that time I was not working for Selective Service.

Whether this document was ever at the appeal board I know only from the records. On the back of the questionnaire it shows that on October 10, 1956 the file was forwarded to the appeal board. I am familiar with the rules and regulations of Selective Service. When a document goes to the local board it is stamped with the board's [fol. 19] stamp. I suppose when the file goes to the appeal board and it receives a document that it will be stamped by the appeal board.

(The question whether the Government's Exhibit B-7 is stamped by the appeal board was objected to by the Government and objection was sustained.)

Witness continuing: When we receive a document pertaining to any registrant a notation is made on the cover sheet of the file that it was so received. There is a stamp on document B-7 itself that it was received at Local Board 177 on January 27, 1956. However, it does not happen to be on the back of the questionnaire, the stamp showing that the document was received. The regulations do not say that every action must be placed on the back of the questionnaire as far as receipts of documents. If it is stamped and placed in the file it is not always necessary to place it on the back of the questionnaire. In some cases under earlier state regulations there used to be an inventory of the contents of the questionnaire, but we are no longer required to do that.

(To the question whether there is an inventory of contents in defendant Parker's file the Government objected and the objection is sustained.)

Witness continuing: Defendant Parker was ordered on the date of December 17, 1960, to take a physical examination and the examination was on January 27, 1961.

FELIX APPOLUS HAGERMAN is called as a witness for the defendant and he states that he cannot take the oath because of his beliefs; that he can state to the Court that he will tell the truth and he affirms that he will tell the truth, nothing but the truth in his testimony in this case.

[fol. 20] FELIX APPOLUS HAGERMAN a witness called by and on behalf of the defendant herein having first affirmed to tell the truth, was examined and testified as follows:

Direct examination.

By Mr. Heisler:

My name is Felix Appolus Hagerman. I live in Sullivan, Illinois at 901 South Hamilton Street. I am assistant pastor to the Church of Jesus Christ at Sullivan. I am also an employee of Community Industries, Ltd. of the same city. I have attended the meetings of the church all my life, and am very familiar with the history of the church and its tenets. The church is sometimes referred to in the vernacular as the Harshmanite Church.

(To the question why is the Church refefred to as the Harshmanite Church, the Government objects. Objection is sustained.)

(The Court rules that the testimony of this witness as to the tenets of the church to which the defendant belongs is not a matter for the jury. The tenets of the defendant's faith which he relied on to seek the classification which he sought are contained in the Exhibits now in evidence.)

Witness continuing: I am employed by the Community Industries for about 15 years. The Church of Jesus Christ of which defendant Parker is a member is not a manufacturing organization. It was never engaged in the manufacture of any kind of products. There is a manufacturing organization known as Community Industries, this is not owned by the Church of Jesus Christ. The Community Industries is an Illinois Corporation and owned by its stock-[fol. 21] holders. The Community Industries never manufactured ammunition or war goods. The defendant Parker was employed by Community Industries in connection with

the shipping and packaging in the candy division. He never had any managerial rights or functions and he never determined what Community Industries manufactured. He is not a member of the Board of Directors. He is an hourly paid employee. I know from my own knowledge that Parker is a member of the Church of Jesus Christ of Sullivan, Illinois. He was such a member for a number of years. He has always followed all of the tenets of the Church. I know his reputation in the community where he lives. His reputation for truth and veracity, honesty and integrity was never questioned.

Community Industries employs some members of the Church of Jesus Christ of Sullivan, Illinois. It also employs other citizens of Sullivan and surrounding areas who are not members of the Church.

(To the question as to what proportion of the employees are members and what proportion of the employees are not members of the church, the Government objects and objection is sustained.)

Witness continuing: The Community Industries has three divisions. One division manufactures small garden machinery, tillers, snow blowers and riding tractors and the like. The other division manufactures dresses and related items. The third division manufactures candy items, candy bars, candy in bulk, and that sort of thing.

The Court: Do they manufacture any items for use by the Government such as tents and uniforms?

The Witness: The dress division in times past has [fol. 22] manufactured some tents. I believe this was before my managerial association with the company. In recent years some of the candy has been sold to Government sources.

The Court: Candy for army rations, isn't that right?

The Witness: I do not know that in particular rations have been sold. Some survival kits have been manufactured for us—I don't know where it was used, to be frank with you.

The Court: Do you know whether there were some valves used on naval vessels that were manufactured?

The Witness: Not since I have been with the company, sir.

The Court: You don't know whether they have ever made them?

The Witness: I know that they have never made any naval equipment for the Government.

By Mr. Heisler:

(Witness continuing). At your request, I checked the records of Community Industries to find out whether or not there was ever any kind of valve used on naval vessels and other items manufactured by the company. I have found that during World War II the division that is now manufacturing garden tractors operated as a machine shop. At that time work was done for the Crane Company in Chicago. At that time some machining was done on valves. That is all I have been able to determine from my checking in the records.

Whether those valves were ever used on naval vessels or not, I have no knowledge. The Community Industries made those valves only for the Crane Company.

Since World War II the division got out a small garden tractor and marketed it on a national basis. I don't know whether or not any of the garden tractors are bought from any of our dealers by the army or navy. I have no knowledge of that. I would doubt it somewhat if they were. [fol. 23] I don't know what the Crane Company was doing with these valves that we machined for it.

Government Exhibit B-16 says that "Community Industries does not manufacture munitions in the ordinary sense of the word." I know that the Community Industries does not manufacture munitions not in the ordinary sense of the word.

(To the question whether the witness knows that Community Industries manufactured for the navy and for the army or for the Air Force or for the Marine Corps, any items the Government objects and the objection is sustained.)

and the Court states that "this witness is uncertain about what went on in the company."

Mr. Heisler: Uncertain? I protest against that, your Honor. I don't think that he was.

The Court: He said he didn't know about things, he didn't know where these valves went after they went to their contractor.

Mr. Heisler: I thought that was very definite. It shows that this document is lying when it says that they manufactured for the Navy. They manufactured for the Crane Company, and the Crane Company could have sold it to Russia. They would not be responsible for it and it would be just as untrue as it is here now when they say that they manufactured for the navy.

(Defense attorney's question whether the witness checked the records to find whether the company ever manufactured any kind of valves or any other material for the navy or for the navy to be used on naval vessels, objected to by the Government and the objection is sustained.)

By Mr. Heisler:

Q. Mr. Hagerman, did you as assistant pastor of the [fol. 24] Church of Jesus Christ of Sullivan contact the Draft Board, Local No. 177 in that city, in connection with the registration of a member of your church, Mr. Parker?

Mr. Bittman: I object as being outside of the Selective Service file.

The Court: He may answer the question yes or no, but I am fearful of what the next question might be.

Mr. Heisler: My next question would be whether or not he ever heard of the Draft Board questioning his sincerity, honesty or integrity and veracity—

The Court: He said the defendant had a good reputation.

Mr. Heisler: No, but with reference to the Draft Board. The Draft Board may disagree with the community on reputation stories and they may have their own category for application.

The Court: You may answer the question yes or no, but I doubt that I would let you go further.

(To the question whether the witness was present and heard a Draft Board member in Sullivan make a statement that no one in Sullivan will receive a classification of 1-O

the Government objects and the objection is sustained. The jury is instructed to disregard the question.)

Mr. Heisler: May I point out, your Honor, that the Government's Exhibit which was introduced over our objection into evidence states that at least one draft board member made such a statement. So I don't believe it is an improper question, and that is the implication of his objection.

Mr. Bittman: I believe it is hearsay, Mr. Heisler.

Mr. Heisler: If it is hearsay, the Government introduced it into evidence.

The Court: I sustain the objection to the question.

[fol. 25] Witness continuing: My understanding is that during World War II the Community Industries was manufacturing candy, tents, uniforms on government contract and I know from my own knowledge that members of my church were classified at that time as full conscientious objectors and were given classification as 1-O.

(Government attorney objects to the question, the objection is sustained and the witness' answer is stricken and the jury is instructed to disregard it.)

(To the defense attorney's question whether the witness knows as assistant pastor of the church whether or not any member of the church ever accepted a draft into the armed forces as combatant or non-combatant the Government objects and the objection is sustained.)

Mr. Heisler: Can I not ask any questions and obtain any answers pertaining to the tenets of the church to which the defendant belongs who is now standing trial? Then I am not going to ask any questions further.

The Court: We have resolved that. The defendant's position with respect to the tenets of the church were contained in his file. The jury will have that file to look at when they deliberate on their verdict.

Mr. Heisler: Therefore I cannot have the assistant pastor testify to it?

The Court: We ruled on that, Mr. Heisler—that is the assistant pastor and also what-ever his other job is. We ruled on that.

Mr. Heisler: I didn't hear the ruling on that.

The Court: I sustained the objection to the inquiry.

Mr. Heisler: I see. So that the general objection—

The Court: Not a general objection. There were special [fol. 26] objections and I told you I thought the general subject might not be inquired into.

Mr. Heisler: That is all, your Honor.

MOTION TO STRIKE TESTIMONY AND RULING THEREON

Mr. Bittman for the Government in the absence of the jury moves that the Court instruct the jury to disregard any testimony given by the witness Hagerman and to strike his testimony.

The motion to strike does not include the testimony as to defendant's good character.

Proceedings in the presence of the jury.

The Court: After hearing fully the arguments of the lawyers and giving careful consideration to the legal questions involved, the Court has reached the conclusion that the jury must disregard all the testimony of the witness Felix Appolus Hagerman in so far as it pertains to the defendant's Selective Service classification, and also the jury must disregard any other testimony of that witness pertains to the defendant's religious beliefs and the tenets of the Church of Jesus Christ of Sullivan, Illinois.

Also, ladies and gentlemen of the jury, you will disregard any testimony of this witness which related to Community Industries, the employer of the witness, and to any testimony particularly which related to the products which Community Industries may or may not have manufactured.

(Defendant's objections were noted on page 260 and were overruled.)

Direct examination of Witness Hagerman.

Resumed by Mr. Heisler:

My job with Community Industries is that of Executive Vice President and Treasurer of the company.

Q. Mr. Hagerman, do you know from your own knowledge

[fol. 27] whether the Church of Jesus Christ of Sullivan, Illinois, was ever engaged in the manufacturing business?

Mr. Bittman: Your Honor.

The Court: Now, Mr. Heisler.

Mr. Heisler: The church, not the Community.

The Court: You object to that?

Mr. Bittman: I strenuously object to it.

The Court: I admonish you, Mr. Heisler.

Mr. Heisler: I thought that was a proper question.

The Court: You understand me very well.

Mr. Heisler: All right, I withdraw this witness, your Honor, and make an offer of proof, if I may.

The Court: You may make an offer of proof if you want to out of the presence of the jury.

Mr. Heisler: That is what I want.

(The jury excused.)

OFFER OF PROOF

Mr. Heisler: If this witness would have been permitted to testify, he would have testified that he knows from his own knowledge that the Church of Jesus Christ of Sullivan, Illinois, was never heretofore nor is at the present time engaged in the manufacturing of any goods either directly or indirectly, through a subsidiary, or by a manufacturing organization which the church may own: that the church owns no manufacturing industry and that it was never manufacturing any kind of goods.

The Court: What is the position of the Government in respect to the defendant's offer of proof?

Mr. Bittman: I object to the offer of proof.

The Court: I sustain the objection.

Mr. Heisler: Your Honor, the defendant intended and would have proved by this witness, Felix Hagerman, that the Selective Service classification given to defendant Par- [fol. 28] ker was the result of bias, prejudice and caprice. He particularly would have testified to it that he heard member or members of the local draft board in Sullivan, Illinois stating that no one in Moultrie County does receive a 1-O classification for various reasons.

One of the reasons, by at least one of the draft board members whose name was Mr. Bone, was that 1-O classi-

fication does not count to the draft board's quota, and in consequence, when 1-O classification is given to anyone, then another young man has to be brought in to take his place.

The second reason that draft board member stated why 1-O classification is not to be given to anyone, including the defendant, was that it is not fair that young men should go into the armed services while others, solely because of religious training and beliefs, are exempted from doing so.

A third reason that draft board members or member stated why the classification of 1-O should not be given to conscientious objectors, including the defendant here, is because his son, who is also a religious member of a church and who also believes in the teachings of Jesus Christ, did go into military service.

If this witness would have been permitted to testify he would have testified that the statement contained in Government's Exhibit B-16, written by Mr. T. O. Smith of the Attorney General's office, to the effect, that the minister of the church declared that the church would be willing to manufacture anything in wartime for the Government is not true, that the minister of the church never so stated; that the minister of the church stated that the church members are abiding by all laws adopted by the Government except those which compel them to act against their conscience and against their understanding of the [fol. 29] Commands of the Lord; that they would manufacture anything that can be used for civilian purposes because the church members under the teachings of the church do not feel that it is the responsibility of the church what happens to the material or to manufacture it if it can be used by and is basically manufactured for civilian purposes.

He would also have testified, if permitted to do so, that the Community Industries itself, which existed before it became an Illinois Corporation, and has existed since about the second World War, that it never manufactured any war material and that church members would not manufacture any material that can be used directly for destructive or for killing purposes.

He would have testified that he, as assistant pastor, believes that the members of the church would refuse to manufacture bullets, machine guns, tanks, poison gases, and any other war material that directly is used for destructive purposes.

This is the offer of proof made by the defendant.

The Court: What is the Government's position in respect to the so-called offer of proof?

(Mr. Bittman on behalf of the Government objects to the offer of proof and the objection thereto is sustained by the Court.)

MALCOLM LEBERT PARKER the defendant herein is called in his own behalf. He affirms that the testimony that he is about to give shall be the truth, the whole truth and nothing but the truth.

Direct examination.

By Mr. Heisler:

My name is Malcolm Lebert Parker I live in Sullivan, Illinois. I am 24 years of age, married, and I work at [fol. 30] Community Industries in the Lucy Ellen Candy division. My duties are to handle the packaging material for the candy bars and I am receiving clerk. I do not have anything to do with the sale or the contracting of the merchandise. I have been employed eight years by the company from the age of sixteen; before that I was delivering groceries for the grocery store maintained by the company in the evenings after school. I was delivery boy for about a year. I was born in Sullivan, Moultrie County. I am a member of the Church of Jesus Christ in Sullivan. My father and my mother are members of the Church. I remember that I was about 17 years old when I first participated actively in the work of the Church of Jesus Christ, active participation means that I became a Christian and tried to perform the duties of a Christian. I went to Powers Grade School in Sullivan and to the Sullivan High School which I attended for two years and then I dropped out. I didn't go to college.

(To the defense attorney's question whether he was exposed to any difficulties while at school because of his membership in the Church of Jesus Christ the government attorney objects, and the objection is sustained.)

Witness continues: Because of my religious training and belief I do not smoke or drink and I do not ever use force, not even in self defense.

(As to the defense attorney's question whether witness ever had opportunity to test his ability to live up to his beliefs not to use force even in self defense, the government attorney objects and the objection is sustained.)

Witness continuing: My religious beliefs today are the same that they were at the time when I was classified.

[fol. 31] (Government's attorney objects to the question and moves that the answer be stricken, motion granted.)

Witness continuing: Government's Exhibit B-1 on page 7 bears my signature.

On the same page I signed my name to conscientious objection to participation in war in any form.

Witness continuing: I recall that in Government Exhibit B-1 I asked my draft board to give me the specific form required for conscientious objectors. I received such a questionnaire. I completed this questionnaire which is Government Exhibit B-2, and signed it.

(The defense attorney's question whether or not he truthfully answered the question "That I believe in using force only if a man is insane and it will help him" was objected to by the Government and was moved to strike the answer which motion was granted and the jury was directed to disregard it.)

(The defense attorney's question whether or not it was the witness' religious belief which made him answer the question that he doesn't believe in drinking liquor or smoking or swearing or taking part in anything that has evil thought behind it; that he tries to do good to his enemies, was objected to by the Government. It was moved that it be stricken and the motion was granted.)

(The Court suggests that the defense attorney does not pursue this line of inquiry.)

Mr. Heisler: I will not pursue it if your Honor tells me that all my questions directed to the religious training and beliefs of this man if objected to will be stricken from the record.

The Court: I won't tell it to you in just that way. I think you understand clearly what questions are proper within my notion of propriety. If you want to keep on asking these questions, you ask them. I repeat, if the Government [fol. 32] does not object, I will let the witness answer. If the Government objects, I will try to determine the propriety of the question.

Witness continuing:

(The defense attorney's question whether the defendant answered the question on the basis of his religious beliefs that he holds as a command "Return good for evil, To love thy enemies and try to do them good." was objected to by the Government and a motion was made to strike the answer which motion was granted.)

By Mr. Heisler:

Q. Mr. Parker, in your questionnaire there was one question directed to you whether you believe in a Supreme Being. Do you remember that?

A. Yes, I do.

Q. And you answered that question whether you believed as follows:

"Yes, I believe in a Supreme Being. I believe that I must lead my life in complete accordance with the Bible, my conscience, and my understanding or belief. In regard to participation in war, we are commanded to love our enemies and do them good. Also the Bible tells us to return good for evil. I do not believe I can fight against my enemies and do them good. I could not in clear conscience become a member of non-combatant group in the armed forces. I feel to connect myself in any way to an organization whose main purpose is fighting would be contrary to God's command.

Was that your answer?

Mr. Bittman: I object, your Honor.

The Court: I sustain the objection.

Mr. Heisler, that document is in evidence, is it not?

Mr. Heisler: Yes, sir.

[fol. 33] Mr. Bittman: The Government introduced all these documents in evidence, your Honor.

The Court: The jury will see all of these documents. I intend to send them to the jury room for their examination.

Mr. Heisler: Your Honor, I am submitting respectfully it is now too late because the Government attorney said some of these documents are hearsay.

Mr. Bittman: Your Honor, I object. I did not say that.

Mr. Heisler: He said one of the documents prepared by this man is hearsay.

The Court: I sustain the objection.

Witness continuing: I have seen Government's Exhibit B-16 dated June 25, 1957. Government's Exhibit B-17 is the document that I prepared myself in longhand, and I submitted it to my draft board.

(Government Attorney's objections were sustained to the following questions.)

"Did you appear before a hearing officer?"

"Do you recall the name of the hearing officer before whom you appeared?"

"Did you say to the hearing officer that your objection to military service is based on the Commandment, "Thou shall not kill."?

"Did you explain to the hearing officer that the Community Industries does not manufacture munitions in the ordinary sense?"

"Did you mention anything about valves manufactured by Community Industries used on naval vessels?"

By Mr. Heisler:

Q. How old were you during World War II when it ended?

[fol. 34] Mr. Bittman: Objection.

The Court: Sustained.

(Government's objections to the following question was sustained.)

"Did you hear Mr. Brittingham stating in your presence that he would recommend to the Government that you should be given a 1-O classification?

By Mr. Heisler:

Q. In your document which is marked as Government Exhibit B-17, you informed your appeal board that Mr. Smith's statement that you refused to accept 1-A-O classification is based on the Old Testament injunction, "Thou shalt not kill" is false, is that correct?

Mr. Bittman: I object, your Honor.
The Court: I sustain the objection.

By Mr. Heisler:

Q. Do you know from your own knowledge whether or not any organization that you were connected with from the time that you were first employed at the age of 16 ever manufactured any war material?

Mr. Bittman: I object, your Honor, to the question.
The Court: Sustained.

By Mr. Heisler:

Q. Did you personally in your lifetime manufacture any war material, Mr. Parker?

Mr. Bittman: I object to the question, your Honor.
The Court: Sustained.

By Mr. Heisler:

Q. Would you manufacture war material, like bullets, machine guns, tanks, poison gas, or any other material to be used for destructive purposes?

Mr. Bittman: I object to the question, your Honor.
The Court: Sustained.

[fol. 35] (Thereupon Mr. Heisler read Government Exhibit B-17 to the jury.)

Witness continuing: I wrote Government Exhibit B-17 and I also wrote Government Exhibit B-12 that refers to a transaction on September 21, 1956. I wrote Government Exhibit B-12 a day after my appearance before the draft board.

(The Government objects and moves that the answer be stricken. Motion is granted. Jury is instructed to disregard it.)

By Mr. Heisler:

Q. Now in this document, Government Exhibit B-12, you referred to a Mr. Bone. Who was Mr. Bone?

Mr. Bittman: I object, your Honor.

The Court: I sustain the objection.

By Mr. Heisler:

Q. In this document, you said:

"Mr. Bone said they would not give a 1-O classification to anyone at the present time for he did not think it was right for another boy to have to go into service for a boy who did not believe in going into the army or non-combatant service on account of religious belief. He felt the 1-A-O classification was for conscientious objectors."

Did you write that statement?

A. Yes, I did.

Mr. Bittman: I object to that.

The Court: It is in evidence. I sustain the objection. If you want to ask him whether his signature is contained thereon, I will let you ask him.

By Mr. Heisler:

Q. Your signature appears there?

A. Yes, it does.

[fol. 36] Q. And it appears before it was filed with the draft board on October 8, right?

A. Right.

Q. At the time when you wrote this document, did you remember then what Mr. Bone stated?

Mr. Bittman: Objection.
The Court: I sustain the objection.

By Mr. Heisler:

Q. Mr. Parker, I am referring you to Government Exhibit B-16, which on page 2, in the third paragraph, in the middle thereof, alleges that you said to the hearing officer that he would not be considered immoral or a violation of their—meaning the church members' duty—to manufacture ammunition.

Did you make such a statement?

Mr. Bittman: I object, Your Honor.
The Court: I sustain the objection.

By Mr. Heisler:

Q. Did you make the statement to the hearing officer, as it is stated in Government Exhibit B-16, that the manufacture of munitions is not a matter of religious belief but merely a matter of preference?

Mr. Bittman: I object, your Honor.
The Court: I sustain the objection.

By Mr. Heisler:

Q. Mr. Parker, were you ever arrested except for the violation of the Selective Service Act?

Mr. Bittman: I object.
The Court: Sustained.
Mr. Heisler: Beg pardon?
The Court: I sustained the objection.

By Mr. Heisler:

Q. Then I ask you, were you ever charged with violating any law of the United States except the Selective Service violation?

[fol. 37] Mr. Bittman: I object, your Honor, to the question.
The Court: I sustain the objection.

(The Government objects to the following questions propounded by defense attorney.)

"Mr. Parker, do you know how this document B-7 got into the local board 177 file pertaining to you?"

"Do you know whether or not this document B-7 was ever before the appeal board?"

"As a tenet of the church that we do owe the Government any service it might demand that does not involve personal participation in the acts of war." Do you accept that as your belief?

"And whether or not the defendant accepts as his belief, that "We would not willingly engage in the production of any article used directly to cause death. That would be repugnant to our principles and mission in this world."

The Court: Mr. Heisler, I ask you not to pursue any investigation or inquiry about the tenets of the church of this registrant. You are familiar with my ruling in respect to that.

Mr. Heisler: May I then, your Honor, very humbly request—

The Court: You needn't be humble.

Mr. Heisler: I want to be very humble.

The Court: You needn't be humble. You have a right to be here.

Mr. Heisler: I want to ask this Court what can I ask this man if I cannot ask him anything about his beliefs?

The Court: I am not trying the case for the defendant. I am here as an impartial judge.

(The Government objects to defendant's answers to the questions pertaining to his answers on Exhibit B-2 as to [fol. 38] his relationship to organizations that he has been affiliated with; whether the defendant understood the notice printed on said Exhibit as to possible penalty; whether or not he did the typing of Exhibit B-2; whether the statement is his; whether the statement described the church as a Fundamentalist Group and its belief is his.)

Witness continuing:

I recall Captain Schuttler who testified here."

I recall being asked to take a step forward and I did not. At the time when I failed to step forward I did not intend to violate any law of the United States.

By Mr. Heisler:

Q. Now then, when you did not take this step forward, what was the reason that you did not do so?

Mr. Bittman: I object to the question, your Honor.
The Court: I sustain the objection.

By Mr. Heisler:

Q. Did you at that time find yourself confronted with a conflict between the law given to you by the Lord and the law given to you by man?
A. Yes.

Mr. Bittman: I object, your Honor.
The Court: I sustain the objection. If the witness made answer, I strike the answer and direct the jury to disregard it.

(The government objects to the defense attorney's question to the effect whether or not the defendant at the time of his appearance at the Induction Center believed that there was a conflict between the law of man and the law of God; and whether defendant knew at the time of his appearance for induction that there was a law in the United States which said that nothing requires any person to sub-
[fol. 39] ject to military training or service who has conscientious objections to such service, and the objection was sustained.)

(The Government objects and the objections are sustained to defense attorney's questions to the effect whether the defendant told his draft board at the time of his appearance before it on September 21, 1957 why he believed he was entitled to 1-O classification; and whether the defendant discussed at that time with the draft board members the law that he or they thought was applicable to him as a conscientious objector.)

At the time when I appeared at the induction center in 1960 we had a pre-physical and I told them that we were conscientious objectors, that we were going to refuse induction and one of the civilian officers said that we should not even be there for the fact that we were conscientious objectors.

They got out the law and read it. Then they referred us to Captain Schuttler and he took me and Nathan Jerome Harshman into his office and he brought in two witnesses and a photographer and said, "I am going to read the law to you, and if you remain where you are standing that will mean that you refuse induction. If you take a step forward that means that you accept military training." Then he read the law to us, what the penalty was and then he again read the law to us and we remained standing and he excused us. Neither Captain Schuttler nor anybody else at the induction center ever asked me, ever ordered me, ever suggested to me other than what I described that I take a step forward. Neither Captain Schuttler nor anyone else told me, Malcolm Lebert Parker, you are requested, you are ordered, you are asked to take a step forward. We told Captain Schuttler and the officer that we first met there that we are conscientious objectors and we cannot accept [fol. 40] induction for non-combatant service in the armed forces. When we told that to Captain Schuttler he told us the Government would get in touch with us and then we left the induction center.

(Objection by the Government to the question whether the defendant when he remained standing intended to violate any law of the land. The objection was sustained. The Government also objects to the question whether the defendant at the time when he remained standing where he was, did believe that under the laws of the United States he cannot be ordered to be inducted in the armed forces. The objection was sustained.)

Offer of Proof

The defendant makes an offer of proof that if he would have been permitted to answer the question put to him and objected to by the Government, and which objection

was sustained, he would have presented evidence as to those matters upon which the local board acted. He would have testified that he was born in Sullivan, Illinois of Luke and Opal Parker, both members of the Church of Jesus Christ, Sullivan, and that his parents brought him up according to the tenets of the church which church he himself joined when he was fully aware of the importance of such church tenets and when he did know that he was in full agreement and in accord with such tenets and when he was willing, able and ready to live according to such tenets. That he went to school in Sullivan and completed two years of high school from 1952 to 1954 and during these two years he was working in a grocery store and from 1954 to the present time he is employed by Community Industries in its Lucy Ellen Division, which is the candy division of the company.

He would have testified that he registered with the [fol. 41] Selective Service, that he completed his classification questionnaire and that therein truthfully and sincerely stated that "by reason of religious training and belief, I am conscientiously opposed to participation in war in any form and for this reason hereby request that the local board furnish me a special form for conscientious objectors (SSS form No. 150) which I am to complete and return to the local board for its consideration," as appears on Government Exhibit B-1.

The defendant would have further testified that on said classification form he answered concerning the registrant's statement regarding classification, that "in view of the facts set forth in this questionnaire that my classification should be classification 1-O." That he made that statement after having read on said questionnaire the penalty for knowingly making a false statement.

He would have further answered the question that the statements made by him were true and he signed the same. He would have further answered if permitted to do so that he received from his local board Special Form for Conscientious Objectors, Government Exhibit B-2, and that thereon he made his claim for exemption to the effect that,

"I am, by reason of my religious training and beliefs, conscientiously opposed to participation in war, and I am further conscientiously opposed to participation in combatant and non-combatant training and service in the armed forces. I therefore, claim exemption from both combatant and non-combatant training and service in the armed forces."

He would further have testified that he learned from Government Exhibit B-2 that under the provisions of Section 6 (j) of the Universal Military Training and Service Act, as amended, he is entitled to the claim of conscientious objector to all military service. He would further have [fol. 42] testified if permitted that when he completed his special form for conscientious objectors he was because of religious training and belief conscientiously opposed to both combatant and non-combatant service in the armed forces; however, he was ready, willing and able to perform for a period of 24 consecutive months such civilian work contributing to the maintenance of the national health, safety or interest as his local board deems appropriate.

He would further have testified if permitted, that he answered the questionnaire to the effect that he believed in a Supreme Being and he received his training and acquired the belief on the basis of which he claims his exemption from combatant and non-combatant military service from his father and mother and from the Church of Jesus Christ in Sullivan, Illinois.

He would have said further that he gave the name of Leah Harshman, Pastor of the Church of Jesus Christ as the individual upon whom he relies most for religious guidance. Then he stated that he believes in using force only if a man is insane and it will help him; that he doesn't believe in using force even in self defense; that he doesn't believe in drinking liquor, smoking or taking part in anything that has evil thought behind it; that he doesn't believe in being yoked with unbelievers and that he tries to do good to his enemies; that he was raised in the Church of Jesus Christ and accepts its teachings.

He would have further testified if permitted to do so that he described the creed of his church in relation to

participation in war as follows: "Return good for evil. To love thy enemies and try to do them good. To be unyoked from unbelievers."

That he believes that he must live his life in complete accordance to the Bible, his conscience and his understanding of belief. That in regard to participation in war, [fol. 43] he is commanded to love his enemies and to do them good, also the Bible tells him to return good for evil. He doesn't believe that he can fight against his enemies and do them good. He could not in clear conscience become a member in a non-combatant status in the army. He believes that to connect himself with any organization whose main purpose is fighting is contrary to God's command of no retaliation and to Christ's command for us. He would have further testified if permitted that he stated on his questionnaire that his church belongs to the Fundamentalist group and that they share most of the basic doctrines of this group. They differ in that they have no outward ordinances such as baptism or the Lord's Supper. That they are taught to take no kind of oath, no legal affirmation. They believe in non-retaliation against evil and he was taught to overcome evil with good. That he believes that to love God and our fellow men and even our enemies fulfills the laws of God and of Christ. That he is most conscientiously bound by the teachings of Christ to his law of love. In any conflict which may occur between obedience to the law of love and the demands of other laws to which we may be subjected, he feels that he must choose obedience to the law of love.

He would have further testified if permitted to answer that he believed that his local board when it classified him on October 24, 1955 as 1-A-O, that is, one who is available for non-combatant military service, classified him wrongly and that he requested thereafter a personal appearance because "due to his religious beliefs cannot accept the 1-A-O classification" as it appears from Government Exhibit B-3.

That he would have further testified if permitted to answer that he appeared personally at the local board for a personal appearance on September 21, 1956; that he was [fol. 44] accompanied by Mr. Thomas King. That he called

the attention of the local board to his Selective Service file which he believed fully justified his receiving a 1-O classification. That following this personal appearance and within 24 hours thereafter, he prepared Government's Exhibit B-12 and therein he truly set forth in accordance with his best remembrance the substance of the conversations that took place with the draft board members.

That thereafter he was again classified as 1-A-O by the draft board and he filed his appeal with the Appeal Board (Government Exhibit B-10) and that he sent a letter written in his own handwriting to the Appeal Board (Government Exhibit B-17) in which letter he referred to a hearing before Mr. F. M. Brittingham, a hearing officer of the Department of Justice.

That with Government's Exhibit B-17, he attempted to refute the false and erroneous statements made by T. Oscar Smith of the United States Department of Justice in his letter (Government's Exhibit B-16).

He would have answered if permitted to do so that he refute[d] the statements made by Mr. Smith in Government's Exhibit B-16 as false and erroneous in the following respect:

That he did not tell the hearing officer that his opposition to military service is based largely upon the commandment "thou shall not kill", but to the contrary, that his opposition is based upon the command of the Lord, "Thou shalt love your enemies and to do good to them who do you evil." That he would have refuted as false and erroneous the statement made by T. Oscar Smith in Government's Exhibit B-16 and that he did not state to the hearing officer "although Community Industries does not manufacture munitions in the ordinary sense of the word, they do manufacture other items for military consumption such as tents, [fol. 45] Wac uniforms, candy for rations and some sort of valve used on naval vessels and other items." To the contrary, the Church of Jesus Christ never manufactured anything, that it never owned any manufacturing organization since it is a spiritual and not a business organization. That to the contrary he also stated that the Community Industries is owned by some members but this organization for which the defendant was working never manufactured

munitions in any sense of the word, and they only manufactured items for civilian consumption some of which may be used for military consumption as well, as for instance, candy, tents, and nurses uniforms.

Defendant would have further testified in refuting T. Oscar Smith's statement if permitted to answer the question, to the effect that he never knew that Community Industries ever manufactured any kind of valve used on naval vessels and other items, and to that extent, Mr. Smith's statement is false. He would have refuted Mr. Smith's statement because he never stated to the hearing officer or to anyone else that "It would not be considered immoral or a violation of their Christian duty to manufacture ammunition", and that Mr. Smith's statement is false to the effect that this defendant stated to the hearing officer or anyone else that the church members' "reluctance to manufacture munitions is not a matter of religious belief but merely a matter of preference."

The defendant would have further answered if permitted to do so, that he was in full agreement with the statement expressed by his Pastor, Miss Harshman, and he is particularly in agreement with her statement that church members "would not willingly engage in the production of any article used directly to cause death; that would be repugnant to our principles and mission in this [fol. 46] world." He would have answered that he would participate in the manufacture of any goods for civilian consumption even though the same may be used for military purposes also, but he would not participate in the manufacture of any material used for destructive purposes and that he would not participate in the manufacture of bullets, guns, machine guns, bombs, in a word, none of those things the purpose of which is to destroy life on this earth. That he would refuse to participate in the manufacture of such things because in accordance with his religious training and belief that would be contrary to his mission on this earth.

He would have further answered if permitted to do so that he reported for induction when ordered to do so, however, he did not take the step forward and that he failed to take the step forward not because he intended

to violate any laws of this land, but solely because by taking the step forward he would have violated his religious training and belief. He would have acted contrary to his conscience.

If permitted, he would have also answered that when he failed to take the step forward he was aware of the law known as 6 (j) of the Military Training and Service Act which provided that nothing in the law should be construed to require any person who was conscientiously opposed to participation in combatant and non-combatant service to be made to perform such service. That he was aware of the provisions of the law pertaining to alternative service in civilian work contributing to maintenance of the national health, safety or interest, and when he failed to take the step forward he was conscientiously opposed to both combatant and non-combatant service, and that he was willing to do civilian work as prescribed by the law. He believed that he had the right under the law to refuse to take the step forward and thus testing whether [fol. 47] in violation of the law, his draft board and the appeal board could order him to participate in non-combatant service contrary to his religious training and belief and contrary to his conscience.

(The Government objects to the offer of proof and the Court sustains the objection to the offer.)

(In the presence of the jury the following proceedings were had:)

Cross examination.

By Mr. Bittman:

I registered with Local Board 177 of Sullivan, Illinois, but I don't remember the exact date. Government Exhibit A has my signature. Government Exhibit B-2 is Selective Service Form 150 which I prepared and returned to the board. Subsequently, I was classified by the board as 1-A-O. I appealed my classification.

Either I or someone at my direction placed Government Exhibit No. 7 with the local board. The board never re-

fused to put any document in my file that I asked them to put in. Prior to the appeal board classification I appeared before a hearing officer of the Department of Justice. Government Exhibit B-17 is the letter that I prepared and sent to the appeal board in response to the Department of Justice's recommendation.

I received a classification of 1-A-O and I had a physical and I received an order for a physical. I reported for the physical and I was found physically acceptable for induction. I received (Government Exhibit B-26) an order to report for induction. I did report on the date of September 14, 1960.

I heard Mr. Schuttler testify about the conversations with me.

Mr. Schuttler asked us if we knew a certain party down in Sullivan, Illinois, which we did not and which question [fol. 48] he asked every selectee from down there and they didn't know either, and then he said something about not approving what we were doing but it was the law that he had to go ahead and ask us if we were going to refuse induction, and he read the law to us and said that if we stepped forward that meant that we were accepting induction. If we remained where we were, we were refusing. He did this twice and we remained where we were. He then asked us if we would sign the statement but we did not and he dismissed us.

I recall that Mr. Schuttler called both our names and I remained standing.

We arrived at the induction station in Chicago on September 14th about 9:00 o'clock, I guess, in the morning. We were at the station until about 3:30 in the afternoon. I would say it was between 1:00 and 2:00 or 2:30 that we had the conversation with Captain Schuttler and the ceremony took approximately 15 minutes.

Redirect examination.

By Mr. Schwartzman:

In the ceremony, Captain Schuttler was standing, we were standing about ten feet apart. Captain Schuttler was

in his uniform. Captain Schuttler made the statement to me, "Malcolm Lebert Parker, I am now going to give you a second opportunity to take the step forward." He said, "You are about to be inducted into the armed forces of the United States. You will take one step forward as your name is called, and that step forward constitutes your induction into the armed forces of the United States."

(The Government objects to the question that the witness tells of the conversation with Mr. Brittingham. Objection is sustained.)

[fol. 49] Witness continuing:

I wrote a letter pertaining to the recommendation of T. Oscar Smith of the Department of Justice that is Government Exhibit B-17.

(Government objects to the question whether the defendant stated in his letter that "The goods that we manufactured for use in the army or navy could be used by civilians too. The good that we manufacture is not directly involved in killing and fighting." The objection was sustained.)

(The Government objected to the question whether the defendant appeared at any time before the appeal board of Selective Service. The objection was sustained.)

VERNON ELDER, a witness on behalf of the defendant, testifies as follows:

Direct examination.

By Mr. Heisler:

My name is Vernon Elder. I reside in Sullivan, Illinois. I am in the law practice and I am now serving as County Judge of Moultrie County. Sullivan is the County seat. I was born in Sullivan and I always resided there.

(Government objects to the question as to the witness' acquaintanceship with members of the Harshmanite Church. The objection is sustained.)

Witness continuing:

I have known the defendant, Malcolm Lebert Parker for practically his entire life. I know his father personally. I know the reputation of the defendant for veracity, truthfulness, sincerity, honesty and integrity, and his reputation is good.

[fol. 50] Richard Russell Harshman was called as a witness on behalf of the defendant and testified as follows:

Direct examination.

By Mr. Heisler:

I resided in Sullivan, Illinois for 26 years. I am employed by Community Industries in the sales department of the Lucy Ellen Candy division. I am so employed for 8 years. I have known the defendant Parker all his life. We have grown up together. I know his reputation in the community. His reputation for truthfulness, sincerity, honesty and integrity is fine, it is good.

Thereafter the defense rests.

Walter Schuttler was called in rebuttal by the Government and testified as follows:

Direct examination.

By Mr. Bittman:

I testified before that when I was Deputy Commanding Officer at the induction station in Chicago, I had a conversation with the defendant Parker. This conversation was pursuant to army regulations. I have the army regulations with me. This is Government Exhibit D-1 and D-2. These are the induction procedures. They are in my care, custody and control.

(Government Exhibits D-1 and D-2 were admitted into evidence.)

Thereupon the Government rests.

(Proceedings outside the hearing of the jury:)

MOTION FOR JUDGMENT OF ACQUITTAL AND DENIAL THEREOF

The defendant presents his motion for judgment of acquittal.

The motion of the defendant made at the close of the evidence for judgment of acquittal denied.

[fol. 51]

DISCUSSION ON INSTRUCTIONS

Discussion between Court and counsel as to the party's requested instructions.

The defendant objects to Government's proposed instructions 1, 8, 11, 19, 20, 24, 25, 26, 27, 30, 31, 32, 33, and 34.

Over the objections of the defendant, the Court grants Government Instructions 1 amended and 8, 11, 19, 20, 24, 26, 30, 31.

(The Government submits an amended Instruction 24 and withdraws the original 24, which amended 24 is approved by the Court over the objection of the defendant.)

The defendant then objects to Government instruction 22 as repetitious of amended 24.

(Government's instructions 22 and 24 are approved by the Court over the objection of the defendant.)

The defendant objects to Government instruction 25 and the same is withdrawn by the Government.

Government instruction 26 is approved by the Court over the objection of the defendant. Upon Defendant's objection to Government instruction 27 the same is withdrawn.

Over the objection of the defendant Government instruction 30 is given.

After the defendant objects to Government instruction 31 the same is amended and as amended is offered to which the defendant objects.

Said instruction is approved by the Court over the objection of the defendant.

The defendant objects to Government instruction 32 which is withdrawn by the Government.

The defendant objects to Government instruction 33.

Thereupon the Government withdraws the same.

[fol. 52] The defendant objects to Government instruction 34, whereupon the Government withdraws the same.

The Government withdraws its request for amended instruction 25 and amended instruction 27.

(The following proceedings were had in the presence of the jury:)

Closing argument on behalf of the Government by Mr. Bittman.

Closing argument on behalf of the defendant by Mr. Heisler.

Closing argument in reply on behalf of the Government by Mr. Bittman.

INSTRUCTIONS OF THE COURT TO THE JURY

Introductory remarks by the Court.

Instructions to be considered as a whole. (Government Instruction No. 1, no objection.)

Instructions binding on jury. (Government Instruction No. 2, no objection.)

Jury to determine the facts. (Government Instruction No. 2, no objection.)

Expression of opinion by the Court. (Government Instruction No. 2, no objection.)

Presumption of innocence. (Government Instruction No. 3, no objection.)

Burden of proof on Government. (Government Instruction No. 4, no objection.)

Guilty not be to inferred. (Government Instruction No. 3, no objection.)

Reasonable doubt. (Government Instruction No. 4, no objection.)

[fol. 53] Credibility of witnesses. (Government Instruction No. 9, no objection.)

Evidence stricken by the Court. (Government Instruction No. 5, no objection.)

"As you have been told, the indictment in this case charges that on or about September 14, 1960, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, Malcolm Lebert Parker, being a male person, was required to and did register under provisions of the Universal Military Training & Service Act, and who duly became a registrant at Local Board 177, Sullivan, Illinois, and was duly classified in Class 1-A-O, and was ordered to report for induction by said local board, then and there unlawfully, wilfully, knowingly and feloniously did neglect, fail and refuse to perform the duty of submitting to induction as is required by law.

"The defendant, as you know, has pleaded not guilty to the indictment. The indictment charges a violation of a provision of the Universal Military Training & Service Act which reads in pertinent part as follows:

"'Any person who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in execution of this title, or rules and regulations or directions made pursuant to this title, shall, upon conviction in any District Court of the United States of competent jurisdiction, be punished—' And so forth." (Government Instructions 18 and 26, the latter objected to and given over the objections and exceptions of the defendant.)

"Selective Service registrants, ladies and gentlemen, classified in Class 1-A are available for military service. A registrant classified in Class 1-A-O means that he has been granted a conscientious objector classification; however, he is available for non-combatant military service only. [fol. 54] The classification 1-A-O is designed to embrace those who are found to be conscientiously opposed to taking life or active participation in mortal combat. Inductees of this class are not required to bear arms but serve in the Medical Corps and other service units." (Government Instructions No. 19 and 20 objected to and given over the objections and exceptions of the defendant.)

Final order of the draft board, if lawful, is binding. (Government Instruction No. 21, no objection.)

A legal order of induction is binding. (Government Instruction No. 22, no objection.)

The Court determines the legality of the order of induction. (Government Instruction No. 28, no objection.)

"The decision of the draft board concerning classification made in conformity with regulations is final, and the determination as to whether this decision was in conformity with the regulations is made exclusively by the Court. In this case the Court has decided that the draft board's determination of the 1-A-O classification was made in conformity with the regulations of the law." (Government Instruction No. 24 objected to and given over the objections and exceptions of the defendant.)

Jury to determine willful failure to submit to induction.

(Government Instruction No. 28, no objection.)

"The defendant was classified in Class 1-A-O by the Selective Service System, that is to say, his draft board, which is an agency of the Federal Government. Whether or not this classification was a legal one is exclusively for the determination of the trial court. I have gone over and reviewed the Selective Service file and I have found that there is a basis in fact for the 1-A-O classification; therefore, you are instructed that in your independent [fol. 55] review of the evidence, you are not authorized to determine whether or not this classification given to the defendant was a proper one because under the law this is not an issue which the jury is authorized to determine.

"The defendant, of course, has a right to a jury trial and he has had one; however, that constitutional right does not include the right to have you, the members of the jury, determine whether you agree with the classification which was given to the defendant by the draft board. Consequently, since the Court has determined that this 1-A-O classification is a legal one, that determination is conclusive." (Government Instruction No. 31, objected to and given over the objections and exceptions of the defendant.)

"It is the exclusive function of the Selective Service Board to classify registrants and to fix the time of their induction into the service. The defendant, as a registrant, neither has nor had he the right to determine for himself

whether he should be given any particular classification." (Government Instruction No. 30 objected to and given over the objections and exceptions of the defendant.)

Objections made during the trial ought not to influence the jury. (Government Instruction No. 6, no objection.)

"You, ladies and gentlemen of the jury, are the sole judges of the credibility of the witnesses and the weight which is to be given to the testimony of the witnesses who appeared here on the witness stand. In weighing the testimony of each witness, you should carefully scrutinize it, consider all the circumstances under which the witness testified, his demeanor on the stand, the relation which he bears to the Government or to the defendant, the manner in which he might be affected by the verdict, the extent to which the witness is corroborated or contradicted by other [fol. 56] credible evidence, and, in short, any circumstances that tend to throw light upon his credibility; and, applying these tests which I just stated, it is for you to determine the weight which is to be given to the testimony of each witness." (Government Instruction No. 8 objected to and given over the objections and exceptions of the defendant.)

Credibility of witnesses. (Government Instruction No. 9, no objection.)

Contradictory testimony. (Government Instruction No. 10, no objection.)

"The defendant, Mr. Parker, has testified from that witness stand and you have heard his testimony. The fact that he is the defendant does not mean that he cannot tell the truth. You should weigh his testimony as a defendant by the same rules which you should weigh the testimony of any other witness, but you should keep in mind that he is the defendant in this case, and, of course, has a vital interest in the outcome of the trial." (Government Instruction 11, objected to and given over the objections and exceptions of the defendant.)

Good reputation of defendant. (Government Instruction No. 12, no objection.)

Evidence to be examined in the light of common experience. (Government Instruction No. 13, no objection.)

Exclusive of sympathy, passion and prejudice. (Government Instruction No. 14, no objection.)

Colloquy between Court and counsel should not be considered by jury. (Government Instruction No. 15, no objection.)

To convict, there must be found evil intent. (Government Instruction No. 17, no objection.)

[fol. 57] Counsel's statement is no evidence. (Government Instruction No. 16, no objection.)

Jury not to consider punishment. (Government Instruction No. 29, no objection.)

Form of verdict and general instruction to the jury.

DEFENDANT'S REJECTED INSTRUCTIONS

"The court further instructs you that one with innocent motives, who honestly believes an order to be unconstitutional or unlawful and, therefore, not obligatory, may well refuse to obey the order until a Court shall have held it valid. If you find from the evidence that defendant Parker believed the induction order given to him to be invalid had the right to resist its command until the Court declared it to be valid. The testing of the validity of the induction order herein and of itself is no crime and if you find that the intent of Parker was to so test the order and you further find that his intent was not to violate a valid law, you must find him not guilty." (Or 67—Defendant's instruction "Y" objected to by Government and objection sustained.)

"At all times pertinent to this matter there was in full force and effect a section of the Selective Service law enacted by The Congress of the United States which reads as follows:

'Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and ser-

vice because of such conscientious objections whose claim [fol. 58] is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such non-combatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regula- [fol. 59] tions as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title,

to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record of appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors." (Or 73-74—Defendant's Instruction "G" objected to by Government and the objection sustained.)

"Failure of the United States Government or of a defendant to produce available evidence which would help decide the issue may raise an inference that the evidence would be unfavorable to the party to whom it is available." (Or 75—Defendant's Instruction "W" objected to by Government and the objection sustained.)

"In deciding this case the Court instructs you that you are not to be concerned in the slightest with the question whether you agree or disagree with the religious position taken by the defendant. The Congress of the United States has provided that those persons who, because of religious [fol. 60] training and belief, are opposed to military training are to be treated differently than those who believe otherwise. That is as much a part of the law of our country as any other law." (Or 77—Defendant's Instruction I objected to by the Government and objection sustained.)

"I instruct you that the defendant in asserting his claim for classification as 1-O was not claiming that he was free from all type of service to his country; he was claiming that, because of religious training and belief, he had a right to render what is known as alternative service to his country instead of combatant or non-combatant military service. Alternative service under the law consists of performing for a period of 24 consecutive months civilian work contributing to the maintenance of the national health, safety or interest." (Or 78—Defendant's Instruction U objected to by Government and objection sustained.)

"The Act of Congress and the applicable Selective Service Regulation governing the handling of appeals of persons claiming 1-O classification provide a method of procedure by which the Appeal Board, before deciding the merits of the claim, shall obtain from the Department of Justice its recommendation on the matter. This is done through the medium of a Hearing Officer who holds a hearing and conducts an inquiry as to the character and good faith of the objection of the person involved. This function of the Department of Justice, acting through a Hearing Officer, is an important and delicate responsibility. In performing that function the Department, acting through the Hearing Officer, must adhere to standards of procedure which will enable it to discharge its duty to forward sound and unbiased advice to the Appeal Board for its consideration in deciding the merits of the case." (Or 79—Defendant's Instruction "K" objected to by Government and objection sustained.)

[fol. 61] "You must determine the selective service boards fully and fairly complied with the applicable regulations as promulgated by the President. Such regulations limit and define the jurisdiction of the boards, and consequently, if there has not been a full and fair compliance with such regulations the order to report for induction would be unlawful." (Or 80—Defendant's Instruction "L" objected to by Government and objection sustained.)

"You will be required to determine whether the defendant was denied any rights afforded by the selective service regulations or whether the defendant was deprived of any rights by the failure of the boards to give full and fair consideration to the applicable regulations or if they acted arbitrarily or capriciously or a result of bias and prejudice in classifying the defendants." (Or 81—Defendant's Instruction "M" objected to by Government and objection sustained.)

"The act of Congress and the Selective Service Regulations limit and define the jurisdiction of Selective Service Boards and action of such boards contrary to or not in full and fair compliance therewith or made arbitrarily, capriciously, or as a result of prejudice would be lawless and beyond the Boards' jurisdiction.

"The Court therefore instructs you that if you find that the Selective Service Boards' action in denying defendant's claim for 1-O classification and in placing him in 1-A-O classification was the result of bias, caprice, and arbitrary conduct on the part of such boards, or if such were done without fully and fairly complying with the Selective Service Regulations, your verdict should be Not Guilty." (Or 82—Defendant's Instruction "N" objected to by Government and objection sustained.)

[fol. 62] "If you find from all the evidence that the selective service boards denied defendant the right to make full proof before them either orally or in writing of his claim for exemption, or that they refused to give the defendant's claim full and fair consideration, or that the decisions of the boards were based upon or were the result of prejudice, bias, discrimination or unfair procedure, then I instruct you that such action would be lawless and beyond the jurisdiction of such boards and you should return a verdict of not guilty." (Or 83—Defendant's Instruction "O" objected to by Government and objection sustained.)

"It is the law that the failure of the Selective Service Appeal Board to accord a registrant the procedural rights provided by the Acts of Congress and the Selective Service Regulations makes void an order to report for induction and constitutes a valid defense to a criminal charge of refusing to be inducted into the service." (Or 84—Defendant's Instruction "P" objected to by Government and objection sustained.)

"If the evidence in this case shows that the Selective Service authorities acted arbitrarily or capriciously in rejecting the defendant's claim for 1-O classification and in classifying him as 1-A-O then the Court instructs you that your verdict in this case should be Not Guilty." (Or 85—Defendant's Instruction "Q" objected to by Government and objection sustained.)

"If you find from the evidence in this case that the Appeal Board in rejecting defendant's claim for classification as 1-O and in classifying him as 1-A-O acted arbitrarily or capriciously or failed to follow the procedure provided for by the Act of Congress or the Selective Service Regulations, your verdict should be Not Guilty." (Or 86—Defen-

tion in trying to be kind to him. But evidently neither he nor you thought I was kind.

MR. HEISLER: No, your Honor, I am not asking for kindness. I am asking the Court to—make use of the rule that is provided for such cases.

The Court: I think that is the proper sentence in this case.

. . . My disposition is a case like this where the guilt in my opinion is so clearly established, I might say when you speak of the criminal rules, I could avail myself of the rule which provides that no bail be granted. But I make it $5,000.00.

. . . He will be remanded to the custody of the United States Marshal. When he makes bail, he will be released.

Certificate of Court Reporter.

[fol. 66]

UNITED STATES DISTRICT COURT

(Caption—No. 61 CR 49)

JUDGMENT AND COMMITMENT—September 26, 1961

On this 26th day of September, 1961 came the attorney for the government and the defendant appeared in person and

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Section 12, Universal Military Training and Service Act, Section 462, Title 50 App. U.S.C. (Failure to submit to induction into the United States service)

and thereupon the defendant by his counsel moves orally for a new trial and the Court being fully advised it is Ordered that said motion be and the same is hereby denied

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] Two (2) Years and besides that he forfeit and pay to the United States of America a fine in the sum of One Thousand Dollars ($1,000.00) and the costs of prosecution to be taxed and that he stand committed until the fine and costs are paid or until he shall be otherwise discharged by due process of law

[fol. 67] It Is Ordered that bail be fixed in the sum of Five Thousand Dollars ($5,000.00) pending appeal

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Julius J. Hoffman, United States District Judge.

The Court recommends commitment to:[6]

September 26, 1961

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[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number " if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutivel, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5] Enter any order with respect to suspension and probation. [6] For use of Court wishing to recommend a particular institution.

In the United States District Court

(Caption—Criminal No. 61 CR 49)

Notice of Appeal—Filed October 3, 1961

Name and Address of Appellant:
Malcolm Lebert Parker
Sullivan, Illinois

[fol. 68] Names and Address of Appellant's Attorneys:
Francis Heisler and Rotenberg, Schwartzman & Richards
By: Mark Lee Schwartzman
Suite 1730
7 South Dearborn Street
First Federal Building
Chicago 3, Illinois

Offense:
Violation of Section 462, Title 50, App. U. S. Code. (Section 12, Universal Military Training and Service Act)

Concise Statement of Judgment or Order Giving Date and Any Sentence:
The judgment of the Court of the 26th day of September, 1961, on the verdict of the jury, is that the defendant is guilty, and that he be sentenced into the custody of the Attorney General of the United States for the period of two years with a fine of $1,000.00 plus costs.

The above-named appellant hereby appeals to the United States Court of Appeals for the Seventh Circuit from the above-stated judgment.

Mark Lee Schwartzman, Francis Heisler and Rotenberg, Schwartzman & Richards, By: Mark Lee Schwartzman, Attorneys for Appellant.

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Chicago 3, Illinois
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Dated: Chicago, Illinois
October 3, 1961

12 Certificate of Mailing.

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[fol. 69] Stipulation and Orders Extending Time to Print and File Record on Appeal (omitted in printing).

[fol. 70] Clerk's Certificate (omitted in printing).

[fol. 71]

In the United States Court of Appeals

For the Seventh Circuit

No. 13585

September Term, 1961—April Session, 1962

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

United States of America, Plaintiff-Appellee,

v.

Malcolm Lebert Parker, Defendant-Appellant.

Opinion—August 20, 1962

Before Schnackenberg, Knoch, and Kiley, Circuit Judges.

Kiley, Circuit Judge. This is an appeal from the judgment on verdict of a jury, convicting defendant of violation of § 12 of the Universal Military Training and Service Act[1] by his refusal to submit to induction into military service. He was sentenced to the custody of the Attorney General for two years, and was fined $1,000.00.

The defendant Parker, a member of the Harshmanite religious sect,[2] registered for the draft before Local Board 177 in Sullivan, Illinois, May 9, 1955. He was classified 1-A-O[3] and subsequently that classification was confirmed

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[1] 50 U.S.C.A. App. § 462.

[2] The Church of Jesus Christ, Sullivan, Illinois.

[3] This classification covers those who are opposed to combatant service but inductible in a noncombatant capacity.

by the Board after a hearing upon Parker's objection to the classification on the ground of his "religious belief." On Parker's appeal to the Illinois State Appeal Board, the [fol. 72] Department of Justice, by virtue of § 6(j)[4] of the Act, made an inquiry into the case, and granted a hearing upon his claim to an exemption as a conscientious objector under classification 1-O.[5] He and four witnesses appeared before the hearing officer who found Parker had not sustained his claim and recommended the 1-A-O classification. The Department of Justice concluded that Parker had established his conscientious objection to combatant military service but not with respect to non-combatant service. The Department recommended to the Appeal Board that he be classified 1-A-O.

Parker submitted his reasons in writing to the Appeal Board for not accepting the classification. The Board by unanimous vote again classified him 1-A-O. He was then examined physically and found acceptable for service. The Local Board thereafter "reopened and considered anew" the classification and retained him in 1-A-O. No further steps were taken by Parker for another personal appearance or appeal. He was ordered by the Board to report for induction. He reported, but refused to submit to induction. His indictment, trial, and conviction followed.

We see no merit in Parker's contention that there was no basis in fact to support the court's decision not to interfere with his classification.

The Act makes no provision for the customary scope of judicial review; courts are not to weigh the evidence to determine whether the classification was justified; if in conformity with regulations, the Board decisions are final, even if erroneous; and the question of jurisdiction is reached only if there is no basis in fact. *Estep* v. *United States*, 327 U. S. 114 (1946).

The District Court's function was to ascertain "whether there was a basis in fact for the classification," *United*

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[4] U.S.C.A. App. § 456(j) (1961 Supp.).

[5] This classification covers those individuals conscientiously opposed to participation in the armed forces in either a combatant or noncombatant capacity.

States v. *Van Hook*, 7 Cir., 284 F. 2d 489, 494, reversed and remanded for resentencing, 365 U. S. 609 (1961). The court was confined to a review of Parker's file in deciding whether a basis in fact existed. *United States* v. *Mohammed*, 7 Cir., 288 F. 2d 236, 238, cert. denied, 368 U. S. 820 (1961). It was not to look for substantial evidence to support the [fol. 73] determination of the Local or Appeal Board. *Witmer* v. *United States*, 348 U. S. 375, 381 (1955).

In his classification questionnaire Parker claimed a status of conscientious objector to participation in war in any form. He requested, filled out and returned to the Local Board the special S.S.S.[6] form reiterating his claim "by reason of my religious training and belief;" stating his belief in a Supreme Being; his membership in the Church of Jesus Christ in which he was raised and whose teachings he accepted; and in a typewritten statement expanded on his belief and its basis in the Bible.

The Department of Justice hearing officer on Parker's appeal to the Appeal Board found that Parker worked for Community Industries, a Harshmanite enterprise, which produced WAC uniforms, candy for army rations, valves used on naval vessels, and other items usable in war; that Parker did not consider it immoral or a violation of his Christian duty to manufacture ammunition; that Parker viewed the Harshmanite "reluctance to manufacture munitions * * * not [as] a matter of religious belief, but merely a matter of preference;" and that Parker subscribed to the beliefs and opinions of the Harshmanites.

Because we have concluded the District Court did not err in deciding there was a basis in fact for the classification, it follows that the induction order was not void. And it also follows that the District Court did not err in denying Parker's motion for acquittal at the close of the Government's case, for want of a basis in fact.

Parker relies on *United States* v. *Dickinson*, 346 U. S. 389 (1953) to set aside the classification. The Appeal Board's decision on the basis of a registrant's file, giving "consideration" to the recommendation of the Department of Justice, is usually the final determination of the Selective Service System. *Witmer* v. *United States*, 348 U. S. 375,

[6] The Selective Service System, herein referred to as the S.S.S.

377 (1955). In that case, the court interpreted *Dickinson* to hold that there was no basis in fact for the classification because there was no evidence, "incompatible with" Dickinson's proof, to rebut his prima facie case, made out by objective facts. That distinguished Witmer's case from Dickinson's, and distinguishes Parker's. In *Witmer* and here, the question cannot be determined on objective facts such as Dickinson's, which involved a ministerial status. Once Dickinson's status was determined prima facie, the [fol. 74] Government was required to produce a basis in fact on which the court could decide his claims were not as stated. In Parker's case the question is whether there is affirmative evidence produced by the Government that he has not "painted a complete or accurate picture." *Witmer* v. *United States*, 348 U. S. 375, 382 (1955). "When the record discloses any evidence of whatever nature which is incompatible with the claim of exemption" courts may not inquire further as to the correctness of the board's order. *United States* v. *Simmons*, 7 Cir., 213 F. 2d 901, 904 (1954), reversed, other grounds, 348 U. S. 397 (1955).

Parker also relies upon *Batterton* v. *United States*, 8 Cir., 260 F. 2d 233 (1958), which is not in his favor on the facts before us. And each case must "of necessity be based on the particular beliefs of the individual." *Sicurella* v. *United States*, 348 U. S. 385, 390 (1955). The court there said the record "does not even by indirection," deny Sicurella's sincere religious beliefs. Parker argues the record here as to him is like that record as to Sicurella. But Sicurella's sincerity was admitted and the court said "we are therefore relieved of the task of searching the record for basis in fact to support a finding of insincerity." p. 388.

We see no inconsistentcy in the Department of Justice and the Board recognizing Parker's sincerity of religious belief and the classification based on the admitted fact of his willingness to participate in the production of war goods. The Department of Justice recommendation discloses Parker's view that "it would not be considered immoral or a violation of their Christian duty to manufacture ammunitions * * *." This fact would suffice to rebut Parker's prima facie showing. We do not read the language of *Witmer* v. *United States*, 348 U. S. 375 (1955)

that "there must be some inference of insincerity or bad faith" to mean that there must be evidence that registrant is a hypocrite or liar. The Board was not required to classify Parker 1-O merely because he stated he was opposed "to participation in war in any form." His testimony taken as true disclosed that he did participate in aiding the war effort. There is a distinction between a conviction based on a sincere religious belief and a conviction based on an erroneous inference about what participating in a war means. In *United States* v. *Wilson*, 7 Cir., 215 F. 2d 443 (1954), the nature of Wilson's employment was not incompatible with his prima facie proof of 1-O classification and the file contained no affirmative evidence [fol. 75] to support the National Board's 1-A classification. That case does not aid Parker.

Parker's file does not show that he was given notice of the time and place of hearing by the Department of Justice examiner or sent a copy of the Department recommendation to the Appeal Board, to which he was entitled to file a written reply. He contends there was not full compliance therefore with the Selective Service regulations. The Department of Justice letter to the Board discloses a hearing was had and the file contains Parker's letter or "reply" to the Appeal Board. There is no substance to this contention. And we are not to determine the truth or falsity of the evidentiary basis of the Department of Justice recommendation unless the irregularities affected the Appeal Board's review. *United States* v. *Moore*, 217 F. 2d 428, reversed on other grounds, 348 U. S. 966 (1955).

The Local Board clerk testified that the Board "felt they were doing their best to acknowledge the registrant's religion * * *" and thus, according to Parker, showed that emotion rather than the law permeated the Local Board proceeding. The only relevant issue before us in this case is the classification of the Appeal Board in its independent, de novo proceeding. This proceeding superseded the Local Board's hearing because there is nothing to show that the prejudice of the Local Board, if any, corrupted the decision of the Appeal Board. *United States* v. *Van Hook*, 7 Cir., 284 F. 2d 489, reversed and remanded for resentencing, 365 U. S. 609 (1961). Nor is there merit in the contention

that the recommendation of the Department of Justice stating that the courts consistently uphold 1-A-O classification where there was a willingness to do work supporting the war effort unduly influenced the Appeal Board and denied him due process. Since there is affirmative evidence to support the classification, we presume in the absence of further showing that the Appeal Board did not fail in its duty to respect Parker's rights.

There was no error in the District Court's ruling which precluded production of the Department of Justice hearing officer's report; and no error in denying the motion for acquittal on this ground. Neither the Act nor the regulation, since 1952, requires the report placed in the file, *Gonzales v. United States*, 364 U. S. 59 (1960).

The only relevant questions at the trial were whether there was a basis in fact for the classification; and if so, [fol. 76] whether Parker refused to submit to induction. The first question was for the judge, not the jury, upon the S.S.S. file. *Cox* v. *United States*, 332 U. S. 442 (1947), rehearing denied, 333 U. S. 830 (1948). The trial court properly refused to permit cross-examination of witnesses before the jury, on the S.S.S. file; and, properly sustained objections to testimony and rejected offer of proof on testimony bearing on the classification by the Local Board.

The only question for the jury in this case was whether Parker refused to submit. The court erred in permitting the S.S.S. file to go to the jury, for, as the court in *Cox* said, "* * * nothing in the file is pertinent to any issue proper for jury consideration." But we see no prejudice from this fact since the jury had already heard oral testimony of the substance of its contents. The court properly precluded testimony that Parker's intention in refusing to "step forward" was merely to test the Draft Board's right to order his induction.

The court refused to give Parker's proffered instruction setting forth § 6(j) of the Act. This was not error. The question of exemption from service was not for the jury. Nor was there error in the refusal to give an instruction on bias and prejudice, because there was no evidence from which an inference could be drawn that bias or prejudice influenced the Appeal Board's classification. We have read

the other refused instructions, and arguments for them in the transcript, and see no error in the rulings. The court should not have instructed the jury on its "independent review of the evidence" nor on credibility of witnesses in this case. But these errors were not prejudicial.

The judgment is Affirmed.

[fol. 77]

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 13585

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

MALCOLM LEBERT PARKER, Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JUDGMENT—August 20, 1962

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

[fol. 78]

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

ORDER DENYING PETITION FOR REHEARING —September 14, 1962

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

[fol. 79] Clerk's Certificate. (omitted in printing).

[fol. 80]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 17, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.